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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. RONALD RAY KUPSCH III, Defendant and Appellant.	B218426 (Los Angeles County Super. Ct. No. MA026253)

APPEAL from a judgment of the Superior Court of Los Angeles County, Larry P. Fidler, Judge. Affirmed with directions.

Jennifer A. Mannix, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews and G. Tracey Letteau, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Ronald Ray Kupsch III appeals from a judgment of conviction entered after a jury found him guilty of first degree murder (Pen. Code, § 187, subd. (a)) and found true the allegations that the murder was committed by means of lying in wait, during the course of a robbery, and during the course of a kidnapping (*id*., § 190.2, subd. (a)). Defendant was also found guilty of conspiracy to commit a crime (*id.*, § 182, subd. (a)(1)), with the jury finding one or more of the alleged overt acts to be true. In addition, the jury found him guilty of robbery (*id.*, § 211), kidnapping to commit a crime (*id.*, § 209, subd. (b)(1)), and arson causing great bodily injury (*id.*, § 451, subd. (a)).

The trial court sentenced defendant to life without the possibility of parole for the murder and imposed a concurrent indeterminate term of 25 years to life in prison for the conspiracy. It imposed a concurrent indeterminate term of 15 years to life in prison for the kidnapping and a concurrent term of 9 years for the arson causing great bodily injury, and it stayed a determinate term of three years for the robbery. The court also imposed five $30 fines under Government Code section 70373; a $40 penalty assessment under Government Code section 76000.5, subdivision (a); a DNA penalty assessment of $40 under Government Code section 76104.6, subdivision (a)(1); and a $140 penalty assessment under Government Code section 76704.7.

On appeal, defendant contends the trial court erred in refusing to instruct the jury on voluntary intoxication, abused its discretion in sentencing defendant to life without the possibility of parole, failed to stay the sentences for arson and kidnapping to commit robbery, and erred in imposing certain assessments. We agree that the assessments under Government Code sections 76000.5, subdivision (a), 76104.6, subdivision (a)(1), and 76104.7 must be stricken. In all other respects, we affirm.

FACTS

In February of 2003, William Whiteside (Whiteside) was living in a mobile home with Valerie Martin (Martin), defendant, who is her son, and defendant's pregnant girlfriend, Jessica Buchanan (Buchanan). Whiteside and Martin worked at Antelope Valley Hospital. Defendant was a White supremacist and associated with other White supremacists, including Donovan Casey (Casey), Bradley Zoda (Zoda), Christopher Kennedy (Kennedy), and Stewart Smith (Smith). Whiteside's racial background was non-White and defendant did not like him because of his race. Defendant, his mother, girlfriend, and other friends were all methamphetamine users.

On the morning of February 27, 2003, Zoda came over to Whiteside's mobile home "to get high." While Zoda, defendant, Buchanan, Martin, and Kennedy were in a room talking and smoking methamphetamine, Martin said that she owed a $300 debt to "some Mexicans" for methamphetamine and if she did not pay, the "Mexicans" would come over. The group discussed options to repay the debt, including stealing cars. While Buchanan was in another room, Kennedy asked Zoda if he was "down with it," and they discussed robbing Martin's "old man." It was decided that they would go to the Antelope Valley Hospital parking lot, and Zoda would "jump" Whiteside and take his wallet when he got off work.

Around 9:00 p.m., Martin drove Kennedy, Zoda, and defendant to the hospital. When they arrived and located Whiteside's car, it was determined that the vehicle was too close to the street and there would be too many witnesses. Martin suggested an alternate plan. She would drop the other three at "Suge's"[1] mobile home, call Whiteside and ask him to pick them up on his way home from work. The three were dropped off at Suge's mobile home and smoked methamphetamine.

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[1] "Suge" was the nickname for Sean Smith, and the nickname is used to avoid confusion with Stewart Smith.

When Kennedy informed defendant and Zoda that Whiteside was near the mobile home, they left to meet him. Defendant carried a wooden stick and Kennedy carried a red aluminum bat. Kennedy entered the right rear passenger seat of Whiteside's car, Zoda entered the passenger seat behind Whiteside, and defendant entered the right front passenger seat. Kennedy and defendant began striking Whiteside with the stick and bat. Zoda got out of the car, went to the driver's window and began striking Whiteside with his fists. Whiteside was struck approximately 28 to 29 times and was rendered unconscious. Kennedy took Whiteside's wallet; defendant and Kennedy then placed Whiteside in the car's trunk. Kennedy drove them around until they got lost.

While they were driving around, they heard a noise coming from the trunk and realized that Whiteside had opened the trunk. Kennedy stopped the car; defendant got out and closed the trunk. Whiteside was able to open the trunk a second time. Kennedy got out of the car with defendant and he beat Whiteside with the stick. They closed the trunk and drove around in an effort to find a familiar landmark.

Defendant called his mother and asked her to bring gasoline. When Martin arrived, Kennedy took the gasoline container and began to dump gasoline all over the car. Defendant lit the gasoline on fire. Defendant accidently burned Kennedy.

They returned to Whiteside's mobile home. Defendant, Kennedy, and Zoda took off their clothes and placed them in a trash bag. Defendant took off his skater shoes with red laces and placed them in the trash bag. After awhile, everyone went to Kennedy's residence, where they smoked some drugs.

Later the same morning, several deputies, including Kennedy's uncle, a reserve deputy, came to the residence and arrested Kennedy for a probation violation. Defendant, Martin, Zoda, and Buchanan left and drove to Rebecca King's mobile home. Casey, a leader of a skinhead gang, was there.

After defendant told Casey what they had done to Whiteside, defendant and Casey left in Martin's car, and defendant obtained money from an ATM using Whiteside's bank card. Upon their return, defendant gave Martin some money. Casey also accompanied Martin to a check cashing business, so she could wire someone money. Later that

evening, defendant went to Smith's house with Zoda. Defendant, driving Whiteside's car, drove Smith to Whiteside's mobile home. While at the mobile home, Smith said that they needed to leave because Whiteside was coming home. Defendant told Smith, "Bill's not coming in. We killed him." He also showed Smith his two "M" tattoos on the back of his neck.[2]

Defendant stayed in a motel for a few days. During that time, he told the details of the murder to Smith. At some point, defendant, Zoda and Smith went to a dumpster and burned the plastic bag containing the bloody clothes. Prior to burning the clothes, defendant had Zoda take his black skater shoes out of the bag. The shoes did not have any laces. When Zoda was arrested, he was wearing the shoes. When defendant was arrested, he was wearing the red shoe laces on a pair of white tennis shoes.[3] Red was a sign of White supremacy.

On February 28, 2003, a burned-out vehicle was discovered. There was a lighter and a bat near the vehicle. Inside the trunk, Whiteside's remains were discovered. Much of the body had burned away. A partially melted aluminum bat was recovered from the floorboard. An autopsy was conducted and the immediate cause of death was determined to be smoke inhalation and burns to the body. There were also fractures to Whiteside's skull which would have been fatal in less than an hour.

When Whiteside failed to report to work, his former spouse, Tunda Curry (Curry), called Bank of America and inquired about any ATM transaction on their joint account. On March 3 or 4, Curry contacted Martin and told her someone had used Whiteside's ATM card, and photos of the transaction had been requested of the bank.[4]

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[2] Shortly after the murder, Zoda saw a tattoo on the back of defendant's neck. The tattoo included a swastika and two M's.

[3] The tennis shoes and red laces were tested and had Whiteside's blood on them.

[4] Martin had reported Whiteside as missing on March 1, 2003.

After Martin's conversation with Curry, she called defendant in an effort to distance herself from any involvement in the murder. The conversation was recorded, and Martin acted like she had no idea what had happened to Whiteside. Defendant was upset because he knew that the police would have pictures from the ATM showing him making a withdrawal.

On March 10, 2003, defendant's girlfriend, Buchanan, was interviewed by Detective Kennedy. She indicated that on February 27, 2003, she was in Whiteside's trailer and heard defendant talking on the phone. Defendant stated that he needed to get $300 for his mother and "was going to go whack Bill to get the money."

Buchanan said that she went to sleep and when she woke up, defendant, Kennedy, Zoda, and Martin were inside the mobile home. They left and went to Kennedy's home. They parked in the garage and a white pillowcase was taken out of the car. At one point, inside Kennedy's house, she saw blood on defendant's hands. She also saw blood on Kennedy's arms.

Buchanan stated that three days later, defendant and Zoda went back for the white pillowcase and "torched" it. Thereafter, defendant got a swastika and two M's tattooed on the back of his neck. The tattoo meant that defendant had killed someone of a different race.

Three to four days after the incident, defendant told Buchanan that he killed Whiteside by putting Whiteside in the back of Whiteside's car and "beat[ing] the hell out of him." Defendant gave her the details of the incident, including the beating, arson, and getting money from the ATM using Whiteside's bank card. He said that he killed Whiteside because he never liked him, Whiteside yelled at his mother, Whiteside was of the "opposite race" and defendant was a skinhead. Buchanan also recounted details of the phone conversation defendant had with his mother.

DISCUSSION

Failure to Instruct on Voluntary Intoxication

Defendant contends that the trial court erred when it refused to instruct the jury on voluntary intoxication, in that there was sufficient evidence offered during trial to support the instruction. We disagree.

A trial court has a duty to instruct on all "*material issues presented by the evidence*." (*People v. Breverman* (1998) 19 Cal.4th 142, 154, 160.) It must give instructions on voluntary intoxication when they are requested by the defendant and there is (1) "'substantial evidence of the defendant's voluntary intoxication'" and (2) substantial evidence that "'the intoxication affected the defendant's "actual formation of specific intent."'" (*People v. Roldan* (2005) 35 Cal.4th 646, 715,[5] quoting from *People v. Williams* (1997) 16 Cal.4th 635, 677; *People v. Horton* (1995) 11 Cal.4th 1068, 1119-1120.)

In the instant case, defendant elected not to testify. However, there was evidence of methamphetamine use. Several witnesses testified as to their use of methamphetamine and the effects it had on them. Buchanan testified that during the time of the murder, she was consistently using methamphetamine and it caused her to have bad judgment. She saw defendant using methamphetamine every day he was with her, and he was "always high." Rebecca King testified that defendant was "using meth a lot," and it was a very addictive drug. Casey testified that he furnished drugs to defendant and that methamphetamine was a highly addictive drug which affected his judgment and made him paranoid. He also testified that defendant "was always using meth" and was addicted to "meth." Smith testified that he supplied methamphetamine to defendant and that methamphetamine "makes a person paranoid."

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5 Disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, footnote 22.

Zoda testified that prior to going to the hospital to rob Whiteside, he, Kennedy, and defendant "smoked dope." Upon returning from the hospital, they were getting high, smoking "meth," and after the murder, when they went to Kennedy's house, they "start[ed] getting high and whatnot [*sic*]." He also testified that methamphetamine affected his judgment, defendant was addicted to "meth" during the period of the murder, and defendant was "methed out" on February 28, 2003.

During discussions on proposed jury instructions, the trial court asked defense counsel to indicate why an instruction on voluntary intoxication was appropriate. Defense counsel referred to Zoda's testimony that everyone was smoking methamphetamine, defendant was under the influence on the date of the murder, Buchanan's statements that defendant was under the influence on the date of the murder and Casey's testimony that defendant was always under the influence. Even though the prosecutor responded that the testimony of the witnesses was speculative as to defendant's mental state, she said that she did not object to the instruction.

The trial court indicated that it was not inclined to give the instruction and referred to two cases. In *People v. Marshall* (1996) 13 Cal.4th 799, the trial court refused to give an instruction on voluntary intoxication. (*Id.* at p. 848.) The offenses were committed after the defendant had gone without sleep for 24 hours and after he had drunk an unspecified number of alcoholic drinks over a period of some hours. He had champagne, brandy, and malt liquor from 12:30 a.m. to 3:30 a.m., had additional drinks from 7:00 a.m. on, acknowledged feeling the effects of the drinking and being under the influence prior to the offense, and also had a .10 blood-alcohol level three hours after his arrest. (*Id.* at p. 847.) However, evidence was lacking on the effect of the defendant's alcohol consumption on his state of mind. In the instant case, defense counsel argued that *Marshall* was not controlling since the case dealt with alcohol and not methamphetamine. While *Marshall* did deal with alcohol and not methamphetamine, the rationale of the *Marshall* decision is compelling. As in *Marshall*, there was not sufficient evidence of the defendant's mental state to warrant the instruction; the evidence was how methamphetamine affected various witnesses, not defendant.

The trial court also cited *People v. Avena* (1996) 13 Cal.4th 394. In *Avena*, the trial court found that there was no substantial evidence warranting an instruction on diminished capacity based upon the defendant's intoxication. The court found the evidence too weak and insubstantial to justify a diminished capacity instruction. One of the reasons for the refusal to instruct was the lack of evidence showing the effect of alcohol on defendant. "'Normally, merely showing that the defendant had consumed alcohol or used drugs before the offense, without any showing of their effect on him, is not enough to warrant an instruction on diminished capacity. [Citations.]' [Citation.]" (*Id*. at p. 415.)

The trial court reiterated that under California case law, evidence of intoxication was insufficient to warrant instruction on voluntary intoxication and the law required evidence that the intoxication caused "a certain mental state." The trial court suggested that defense counsel might call an expert to justify giving the instruction.

The following day, the trial court issued its ruling declining to give the requested instruction. It relied on two additional cases, *People v. Roldan*, *supra*, 35 Cal.4th 646 and *People v. Williams*, *supra*, 16 Cal.4th 635.

In *Roldan*, the court held while it is true that a defendant has a right to an instruction that pinpoints the theory of the defense, the trial court did not err in refusing to instruct on voluntary manslaughter because of defendant's intoxication. (*People v. Roldan*, *supra*, 35 Cal.4th at pp. 715-716.) The instruction was not warranted even though the evidence showed that the defendant was a habitual drug user, felt "'woozy'" shortly before the crime, was "on 'cloud nine'" after the crime, and there was evidence that his codefendant was heavily intoxicated at the time of the crimes. (*Id.* at p. 716.) There was absolutely no evidence the defendant was so intoxicated that he was unable to form the basic mental intent to commit a robbery or was rendered unconscious. (*Id*. at p. 717.)

Similarly, in *Williams*, the defendant sought the instruction based solely on the testimony of a witness that the defendant was "'probably spaced out'" on the morning of the killings. The defendant also sought to bolster his argument by pointing out comments

he made in his recorded interview to the police near the time of the killings that he was "'doped up'" and "'smokin' pretty tough then.'" The court held that even "[a]ssuming [that] this scant evidence of [the] defendant's voluntary intoxication would qualify as 'substantial,' there was no evidence . . . that [the] voluntary intoxication had any effect on [the] defendant's ability to formulate intent." (*People v. Williams*, *supra*, 16 Cal.4th at pp. 677-678.) There thus was no error in refusing the instruction on voluntary intoxication.

The trial court in the instant case, in its very thorough ruling in declining to give the requested instruction, stated as follows: "It's a two-part test. I will be very candid—actually, in almost all of those cases, the one that surprised me, or at least one or two, the [Supreme C]ourt first held that there really wasn't substantial evidence of intoxication, but that's not the only test. The two-part test is as follows:

"There has to be substantial evidence of the defendant's voluntary intoxication and that the intoxication affected the defendant's actual formation of specific intent; and that's not done here. It's the second part of the test that is missing. For the sake of argument, although there is nobody that actually says he was under the influence when the crimes were committed, there was a lot of testimony that he was a meth[amphethamine] addict, that would be your client, and that he was high every day, and they had seen him taking drugs on a daily basis, including the day of the crime. So for the sake of argument, I will call that substantial evidence of intoxication.

"But not only is there no evidence whatsoever that his – his ability to actually form the specific intent as to any crime or deliberate or premeditate was lacking, what's more interesting is what the other witnesses have to say.

"Everybody agreed that methamphetamine is an addictive substance. Everyone had something different to say about what it did to them. Some were asked if it made you paranoid, some answered yes, then they sort of hedged on it. More important was Stewart Smith's testimony. What Stewart Smith said, on cross-examination, was meth[amphetamine] affects everybody differently. Me, it mellows me out.

"There's no—there's no ground rule that everyone that takes meth[amphetamine] reacts the same way. There has been no testimony, including from those meth[amphetamine] users that testified, that you can't form a specific intent; that it affects your ability to form specific intent; that it affects your ability to deliberate; or affects your ability premeditate, or any of the factors that are present in any of the crimes or any of the special circumstances.

"So based upon that, I can't find a basis for giving voluntary intoxication; and, therefore, the court's not going to."

We agree with the trial court; there simply was insufficient evidence of defendant's mental state to warrant an instruction on voluntary intoxication. Moreover, even if the trial court erred in refusing the instruction, any error would be harmless. A court's failure to instruct on voluntary intoxication is reviewed under the harmless error standard of *People v. Watson* (1956) 46 Cal.2d 818, 836. (See *People v. Rivera* (1984) 162 Cal.App.3d 141, 146.) It is not reasonably probably that defendant would have received a more favorable result had the instruction been given.

The jury convicted defendant of conspiracy, finding that he had agreed to commit murder, robbery, or kidnapping and had intended to commit such offenses. CALCRIM No. 415, given to the jury on conspiracy, required a finding of intent. (See *People v. Swain* (1996) 12 Cal.4th 593, 607 ["We conclude that a conviction of conspiracy to commit murder requires a finding of intent to kill, and cannot be based on a theory of implied malice."].) The jury also found all of the special circumstances true, which required a finding that defendant acted deliberately and with premeditation.

While the jury instructions allowed the jury to consider evidence of defendant's ingestion of methamphetamine in determining his guilt, the jury found that defendant acted with premeditation and deliberation. The testimony and evidence strongly supported the jury's finding. Defendant was part of a plan to rob Whiteside to get money to repay his mother's drug debt. He went to the hospital to rob Whiteside. When the plan was changed, he participated in developing another plan. He took a stick with him when he went to meet Whiteside. He struck Whiteside as he entered the car. He helped

place Whiteside in the trunk of the car. When Whiteside regained consciousness and opened the trunk of the car, defendant participated in giving Whiteside additional beating. Defendant called his mother and had her bring gasoline and meet him at a specific location, and defendant lit the car on fire knowing Whiteside was in the trunk. These actions clearly show that he was acting with premeditation and deliberation. Even after the murder, he bragged that he had killed Whiteside and had two M's tattooed on the back of his neck, which would allow him to gain admittance to a skinhead gang because he had killed someone of a different race. Clearly, the evidence presented provided no reasonable probability that a jury would have found defendant guilty of anything less than first degree special-circumstance murder.

Defendant's Sentence of Life Without the Possibility of Parole

Defendant contends that the trial court abused its discretion and violated his due process rights when it imposed a sentence of life without the possibility of parole. We disagree.

Defendant was 16 years old at the time he committed the murder. The statutory penalty for a person who commits special circumstance first degree murder and "who was 16 years of age or older and under the age of 18 years at the time of the commission of the crime" is "confinement in the state prison for life without the possibility of parole or, at the discretion of the court, 25 years to life." (Pen. Code, § 190.5, subd. (b).) The penalty of life without the possibility of parole is preferred over a 25 years to life term under the statute governing sentence for a person who commits special circumstance first degree murder at age 16 or older but under age 18. (*People v. Ybarra* (2008) 166 Cal.App.4th 1069, 1089.) The mitigating and aggravating circumstances set forth in determinate sentencing guidelines are also proper criteria in evaluating whether leniency should be granted when sentencing a youthful offender convicted of special circumstance murder. (*People v. Guinn* (1994) 28 Cal.App.4th 1130, 1149.) In exercising its sentencing discretion, the court is vested with broad discretion to weigh aggravating and

mitigating factors, including the authority to minimize or even disregard allegedly mitigating factors. (*People v. Lamb* (1988) 206 Cal.App.3d 397, 401.)

Prior to the sentencing hearing, the prosecutor and defense counsel submitted sentencing memoranda to the trial court. The defense argued that defendant was 16 years old at the time of the offense, had a mother who was responsible for her son's drug addiction, and the plan was to rob the victim but turned to murder resulting from methamphetamine intoxication. The prosecution argued 13 aggravating factors including the following: (1) The crime involved great violence or other acts disclosing a high degree of cruelty; (2) defendant was armed and used a weapon; (3) the victim was particularly vulnerable; (4) the manner in which the crimes were carried out indicated planning, sophistication, or professionalism; (5) defendant had prior convictions; (6) defendant was on probation at the time the crime was committed; (7) defendant's prior performance on probation was unsatisfactory; and (8) the offense was a hate crime.

The trial court indicated that it had read the probation report, as well as the sentencing memoranda, and that it had considered the factors listed. The court, within its discretion, determined to impose a life without possibility of parole sentence. It stated as follows: "On count 1, which is the count which the court must determine whether or not to make a determination as to whether it's life or life without parole, giving it some thought, I realize that the defendant is extremely young; however, the facts of this crime, the defendant's lifestyle—and, quite frankly, I don't think that's going to change during his time in prison—the court is going to select life without the possibility of parole as to count 1."

The court added, "I will find one factor in mitigation. I will consider—it is a penalty choice. The factor in mitigation that I find is his age. I think age is a mitigating factor. However, that being the mitigating factor, there are no other mitigating factors."

However, as aggravating factors, the court found that the crime involved great violence, great bodily harm, disclosing a high degree of cruelty, viciousness, or callousness; the manner in which it was carried out indicated planning; the victim was extremely vulnerable; defendant took advantage of a position of trust to commit the

offense; defendant engaged in violent conduct, which indicates a serious danger to society; defendant's prior convictions as an adult or sustained petitions in juvenile proceedings are numerous and of increasing seriousness; defendant was on juvenile probation when the offense was committed; and defendant's prior performance on probation or parole was unsatisfactory.

The factors used by the trial court support the imposition of the sentence selected. The crimes were extremely heinous: Defendant participated in beating Whiteside until he was unconscious and beat Whiteside every time he awoke and tried to get out of the trunk of the vehicle. Ultimately, the vehicle was set on fire with Whiteside, still alive, inside.

The planning was also supported by the record. Defendant and his companions initially went to the hospital to rob Whiteside, until they decided that his car was parked where it might be easily seen. They then planned some more and came up with another plan to rob Whiteside by luring him to Suge's mobile home and beating him.

Defendant also claims his sentence was excessive because the sentence for Zoda was far more lenient. The fact that Zoda was 14 years old at the time of the incident precludes sentencing under Penal Code section 190.5, subdivision (b). In addition, the disposition of a codefendant's case is not relevant to a penalty decision, since a defendant's sentence is based on his own character and record and the circumstances of the offense. (*People v. Riel* (2000) 22 Cal.4th 1153, 1223; *People v. Mincey* (1992) 2 Cal.4th 408, 476.)

The trial court clearly acted within its sentencing discretion in imposing a life without possibility of parole sentence.

Penal Code Section 654

Defendant next contends that the trial court improperly sentenced him under Penal Code section 654 for the arson and kidnapping to commit robbery in addition to the first degree murder. He submits that the murder, arson, and kidnapping offenses were part of an indivisible transaction. We disagree.

In pertinent part, Penal Code section 654, subdivision (a), provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." Under this statutory provision, a defendant may not be punished for two crimes which arise out of a single act or out of an indivisible transaction. (*People v. James* (1977) 19 Cal.3d 99, 119.) "'Whether *a course of criminal conduct* is divisible and therefore gives rise to more than one act within the meaning of [Penal Code] section 654 depends on the *intent and objective* of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.'" (*People v. Rodriguez* (2009) 47 Cal.4th 501, 507.) The determination of whether a defendant's acts constitute an indivisible course of conduct is a question of fact for the trial court. As long as the trial court's findings are supported by substantial evidence, they will not be disturbed on appeal. (*People v. Williams* (1992) 9 Cal.App.4th 1465, 1473.)

In order to determine whether a course of conduct is indivisible, the court looks to "defendant's intent and objective, not the temporal proximity of his offenses." (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) Thus, "if all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once. [Citation.] [¶] If, on the other hand, defendant harbored 'multiple criminal objectives,' which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, 'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.' [Citation.]" (*Ibid.*)

After defendant and Kennedy placed Whiteside in the trunk of the car and Kennedy took Whiteside's wallet, defendant's objective changed. He decided to kill someone he despised. Defendant was a skinhead and hated Whiteside for his race and the way he treated his mother. In *People v. Nguyen* (1988) 204 Cal.App.3d 181, the court

upheld multiple punishment for attempted murder and robbery, finding the shooting "constituted an example of gratuitous violence against a helpless and unresisting victim which has traditionally been viewed as not 'incidental' to robbery for purposes of Penal Code section 654." (*Id*. at p. 190.) "It is one thing to commit a criminal act in order to accomplish another; Penal Code section 654 applies there. But that section cannot, and should not, be stretched to cover gratuitous violence or other criminal acts far beyond those reasonably necessary to accomplish the original offense. Once robbers have neutralized any potential resistance by the victims, an assault or attempt to murder to facilitate a safe escape, evade prosecution, or for no reason at all, may be found by the trier of fact to have been done for an independent reason." (*Id*. at p. 191; see, e.g., *People v. Coleman* (1989) 48 Cal.3d 112, 162 [where robbery was almost complete and victims had been neutralized, the gratuitous murder of one and assault of another to prevent reporting of the murder were separately punishable].) Defendant's objective in the murder of Whiteside was different and not incidental to his objective in committing the robbery and kidnapping for robbery.

Additionally, defendant's objective in burning the car was different than his earlier objectives. The arson was committed to destroy evidence. Even though Whiteside was not yet dead, the injuries he suffered from the beatings were fatal and he probably would have only survived for less than one hour. In *People v. Nichols* (1994) 29 Cal.App.4th 1651, 1657, the court held that separate punishment for both kidnapping and threatening to kill the victim were permissible because the defendant had separate objectives in hijacking a truck and avoiding detection.

Substantial evidence thus supports the trial court's finding that defendant harbored separate and independent objectives in the commission of the murder, kidnapping for robbery, and arson. The trial court did not err in refusing to apply Penal Code section 654.

Imposition of Criminal Conviction Assessment Pursuant to Government Code Section 70373

Defendant contends that the trial court committed error when it imposed five $30 fines under Government Code section 70373 because the statute became effective January 1, 2009, after the crimes were committed. We disagree.

Government Code section 70373, subdivision (a)(1), provides in pertinent part: "To ensure and maintain adequate funding for court facilities, an assessment shall be imposed on every conviction for a criminal offense . . . . The assessment shall be imposed in the amount of thirty dollars ($30) for each misdemeanor or felony . . . ."

Defendant attempts to distinguish *People v. Alford* (2007) 42 Cal.4th 749, in which a fine was applied retroactively. In *Alford*, the Supreme Court found that the Legislature intended for Penal Code section 1465.8 to apply retroactively to convictions after its effective date. The Legislature had linked the monies it projected would be raised by the Penal Code section 1465.8 fines to the 2003 budget. The General Fund was reduced in the same amount as the projected revenue from the collection of the section 1465.8 fine. (*Alford*, *supra*, at pp. 754-755.)

The fee in question here is very similar to that imposed pursuant to Penal Code section 1465.8 and we find no reason why it should not be applied retroactively. Retroactive application to defendant does not violate constitutional prohibition against ex post facto laws, as the statute was nonpunitive in nature; the stated purpose of the assessment was to ensure and maintain adequate funding for court facilities and not to punish. The assessment was not a fine or penalty, the assessment was relatively small, and the amount of the assessment was not dependent on seriousness of the offense. (*People v. Brooks* (2009) 175 Cal.App.4th Supp. 1, Supp. 6.)

Imposition of Penalty Assessments Pursuant to Government Code Sections 76000.5, 76014.6 and 76104.7

Defendant contends that the trial court's imposition of penalty assessments under Government Code sections 76000.5, 76104.6 and 76104.7 violated ex post facto

punishment because the statutes did not exist at the time defendant committed the charged offenses.

Defendant committed the offenses in 2003. Government Code section 76000.5 became effective on January 1, 2007 and, in subdivision (a), provided for "an additional penalty . . . upon every fine, penalty, or forfeiture imposed and collected by the courts for criminal offenses" to fund emergency medical services. Government Code section 76104.6 became law in 2004 and, in subdivision (a), provided for "an additional penalty . . . for criminal offenses" for the purpose of implementing the DNA Fingerprint, Unsolved Crime and Innocence Protection Act (the Act). Government Code section 76104.7 became law in 2006 and provided for "an additional state-only penalty . . . for criminal offenses" for purposes of funding operations of the Act. Ex post facto clauses prohibit the passage of laws that retroactively alter the definition of crimes or increase the punishment for criminal acts. (*People v. Alford, supra*, 42 Cal.4th at p. 755.)

In *People v. Batman* (2008) 159 Cal.App.4th 587, 589, the defendant contended, and the People conceded, that the imposition of DNA penalty assessments under Government Code section 76104.6 violated the state and federal constitutional prohibitions against ex post facto laws. The court agreed and modified the judgment by striking the DNA penalty assessments. The court distinguished the court security fee and the criminal justice administration and booking fee and determined that the DNA penalty assessment was explicitly designated as a penalty and it was a punitive ex post facto law. (*Id.* at p. 591.)

The penalty assessments set forth in Government Code sections 76000.5, 76104.6, and 76104.7 are characterized as penalties, unlike the criminal conviction assessment under Government Code section 70373, and violate the prohibition against ex post facto laws. They therefore must be stricken.

DISPOSITION

The judgment is modified to strike the imposition of the $40 penalty assessment imposed under Government Code section 76000.5, subdivision (a), and the two $140 DNA penalty assessments imposed under Government Code sections 76104.6 and 76104.7. In all other aspects, the judgment is affirmed. The clerk of the court is directed to prepare a modified abstract of judgment and forward a copy to the Department of Corrections and Rehabilitation.

JACKSON, J.

We concur:

PERLUSS, P. J.

ZELON, J.